Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

DATE: May 23, 1997
CASE NO.: 95-INA-526

In the Matter of:

URBAN LEAGUE OF HUDSON COUNTY
Employer

On Behalf of:

SUSANA GRACIELA PENALVA
Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties.

Statement of the Case

On October 4, 1993, Urban League of Hudson County, Inc. ("employer") filed an application for labor certification to enable Susana Graciela Penalva ("alien") to fill the position of Family Services Counselor at an hourly wage of $13.94 (AF 19). The job duties for the position are described as follows:

> Counsels individuals, groups and families to aid in the intervention and prevention of child abuse in the family unit. Assesses the problems and monitors the family progress. Provides career counseling, employment assistance, housing intervention, drug/alcohol abuse education and parenting and family live education to Hispanic clients referred by the Division of Youth and Family Services(AF 19).

The job requirements are a Bachelor's degree in Psychology or Sociology, two years experience in the job opportunity or two years experience as a "Psychological Counselor," fluency in Spanish and knowledge/experience with group therapy.

On March 6, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited several grounds for the denial including violations of section 656.24 (b) (2) (i) which provides that a CO, in judging whether U.S. workers are available for a position, shall look at the results of the employer's recruitment efforts, and determine if there are other appropriate sources where the employer should have recruited. Specifically, the CO objected to the employer's advertising the position in the *Star Ledger,*and argued that the *New York Times* is a more appropriate newspaper to attract qualified applicants (AF 58). The CO also challenged the employer's compliance with section 656.24 (b) (2) (ii), which states that a CO shall consider a U.S. worker qualified for a job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner the duties involved in the occupation. Section 656.21 (b) (6) further provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job-related reasons. The CO alleges the employer failed to provide lawful reasons for rejecting several U.S. applicants including Fernando Paiva, Jr., Magda Bermudez, and Oscar Fernandez(AF 57).

In rebuttal, dated April 13, 1995, the employer argued that it adequately tested the labor market because the *Star Ledger* is a New Jersey newspaper that has a circulation of over 700,000. The employer therefore declined to advertise in another newspaper despite the CO's request that it do so. The employer argues that the cost of advertising must be considered, and the employer

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[1] All further references to documents contained in the Appeal File will be noted as "A*f n*," where *n* represents the page number.

reasonably concluded that advertising in the *Star Ledger*was appropriate because it was substantially lower cost than equivalent newspapers. The employer contends that it complied with section 656.21 (b) (6) by providing lawful, job-related reasons for the denial of Applicants Paiva, Bermudez, and Fernandez. The employer states that it has contacted all of the applicants that it believed to be qualified, and made every effort to accommodate the applicant for an interview (AF 65). The employer maintains that the regulations require nothing more.

The CO issued the Final Determination on April 17, 1995 denying the labor certification. The CO reiterated her conclusions in the NOF and asserts that the employer failed to adequately test the labor market and provide lawful, job-related reasons for rejecting the three applicants. On May 22, 1995, the employer requested administrative review of Denial of Labor Certification pursuant to section 656.26(b)(1)(AF 74).

Discussion

The two issues presented by this appeal are whether the employer published the advertisements in an appropriate newspaper thereby adequately testing the labor market, and whether the employer provides lawful, job-related reasons for rejecting Applicants Paiva, Bermudez, and Fernandez.

Under section 656.21(g), the employer must advertise the job opportunity in a newspaper of general circulation which is most likely to bring responses from able, willing, qualified, and available U.S. workers.[2] An employer meets the *prima facie* requirements of this section by advertising in a newspaper, and explaining why that publication is appropriate. The burden then shifts to the CO to explain why another publication is more appropriate and more likely to attract qualified candidates. *Pater Noster High School*, 88-INA-131 (Oct. 17, 1988).

In this case, the employer, a non-profit organization in New Jersey, advertised for the position of family services counselor in the *Star Ledger*(AF 66). This advertisement appeared in the newspaper for three days and resulted in 14 applicants. The employer maintains the *Star Ledger* is appropriate because it is the largest newspaper in New Jersey with a circulation of 700,000, and the *Star Ledger* tests the market in Hudson County which is where the job exists. The employer also argues that the cost of the newspaper is far less expensive than other area papers. For instance, the employer paid $217.80 to advertise in the *Star Ledger*, whereas similar advertising in the *New York Times* would have cost the employer over $900.00 (AF 65). In taking into consideration these factors, it is clear the employer has met its burden of showing that the *Star Ledger* is an appropriate publication, and the burden thus shifts to the CO.

In the NOF, the CO claims that the *New York Times* is a more appropriate publication to recruit qualified applicants. The CO states “it has been our experience that newspapers like the

[2]Although the CO denies certification on grounds relating to section 656.24(b)(2)(I), we find section 656.21(g) to be the provision at issue.

New York Times attract more applicants for employment opportunities." The CO does not elucidate on her position but simply relies on this statement to establish that the *New York Times* is more appropriate than the *Star Ledger* (AF 58). We therefore conclude that employer has adequately demonstrated why it selected to advertise in the *Star Ledger*, and agree that it is an appropriate publication. *See also Florida Ordnance, Inc.*, 89-INA-106 (Feb. 14, 1990) (the employer advertised for production manager of weapons firm; CO instructed re-advertisement in the *Wall Street Journal*; the employer rebutted by stating that its efforts complied with DOL guidelines and general industry practice; CO failed to explain why the *Wall Street Journal* would be a more appropriate publication). We therefore conclude that the employer has adequately demonstrated why it elected to advertise in the *Star Ledger*, and that the CO failed to show why the *New York Times* is a more appropriate publication.

For the second basis of denial, the CO contends that the employer unlawfully rejected three U.S. workers who applied for the position. Section 656.21(b)(6) provides that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.21 (b) (2) (ii) states that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation. The burden is on the CO to explain why an applicant is qualified. *Ceylon Shipping, Inc.*, 92-INA-322 (Aug. 30, 1993); *Executive Protective Services, Inc.*, 92-INA-392 (July 30, 1992).

The employer contends that Applicant Paiva was contacted by employer on July 22, 1994, and subsequently rejected because he showed no interest in the position. In the Notice of Findings, the CO observes that Mr. Paiva contradicted the employer in a questionnaire distributed by the New Jersey Department of Labor. He acknowledges that the employer contacted him, but he denies the claim that he showed no interest in the position. Mr. Paiva states that he was not given a chance to interview at a time that was convenient for him (AF 42). He also alleges that the employer did not initially identify himself, nor did the employer specify which program the job was for or where the job was located.[3] Mr. Paiva further maintains that he attempted to call the employer on two subsequent occasions, but his calls were not returned. We believe this evidence to be highly probative and thus conclude that the CO has sufficiently explained why the applicant is qualified. Therefore, we affirm the CO's denial of labor certification on the grounds that employer did not provide lawful, job-related reasons for Applicant Paiva's rejection. Accordingly, we find it unnecessary to discuss the rejection of Applicants Bermudez and Fernandez.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

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[3]Mr. Paiva submitted his resume to a P.O. Box address at the *Star Ledger* and was thus uncertain of employer's identity(AF 41).

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.